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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 207.

LINA ROSENMAN and THE NATIONAL CITY BANK OF
NEW YORK, a Corporation, as Executors of the
Last Will and Testament of Louis Rosenman,
Deceased,

Petitioners,

VS.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONERS' REPLY BRIEF.

CHARLES ANGULO,
Counsel for Petitioners.



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I.

CONCERNING SUBDIVISION 1 OF GOVERNMENT'S BRIEF,
pages 13-24.

None of the cases cited by the Government holds or remotely suggests that where a remittance is made to the Collector *in advance of the filing* of an estate tax return, the period of limitation for the filing of a claim for refund under the statute here involved or any comparable statute, runs from the time of such remittance notwithstanding that, pending the filing of the tax return, the tax officials are abstaining from taking any action in respect of the tax and are hold-

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ing the remittance in a suspense account to the credit of the taxpayer. The core of the Government's argument is contained in the following statement on page 20 of its brief:

"Any overpayment, whether made voluntarily by the taxpayer *on the original return* or as a result of an additional assessment made by the Commissioner, is a tax erroneously or illegally assessed or collected and it may be recovered if a claim is filed within the prescribed time after the tax is paid and the amount allowed does not exceed the portion of the tax paid within such period." (Italics ours.)

The above quoted statement does not meet the issue in this case. It makes no reference to a remittance *in advance* of the filing of the tax return.

First, we may eliminate all of the cases and the Commissioner's ruling, cited by the Government, relating to *income* taxes (Br. 17, 19, 20, 23, 24) because the corresponding provisions of the income tax statutes *differ* materially from the provisions of the statute here involved. In 1924 Congress removed income, war-profits and excess-profits taxes from the scope of Section 3228 of the Revised Statutes and enacted separate and different provisions relating to those taxes (§1012 of the Revenue Act of 1924 amending §3228 of the Revised Statutes so as to exclude therefrom taxes covered by §281 of the same Act; §281 of the Revenue Act in 1924 dealing with overpayments of income, war-profits and excess-profits taxes). In so far as material, said Section 281 reads as follows:

"See. 281. (a) Where there has been an overpayment of any income, war-profits, or excess-

profits tax imposed [by specific Acts], the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance from such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions [specifying them but not material here] of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.¹

It will be noted that the above quoted statutory provisions deal with *any* overpayment of income, war-profits or excess-profits tax; whereas, the statute here involved (Section 319(b) of the Revenue Act of 1926) is limited to an overpayment of an estate tax which is "alleged to have been erroneously or illegally assessed or collected". In other words, when Congress in 1926 removed the estate tax from the scope of Section 3228 of the Revised Statutes (Revenue Act of 1926, §1112) and enacted a separate and special provision relating to estate tax (§319(b) of the Revenue Act of 1926) it *retained* in the estate tax statute (and did *not* eliminate as it did in the case of the corresponding *income* tax statute) the phrase

¹ In so far as material to our argument, the corresponding provisions of income tax Acts subsequent to the Revenue Act of 1924 were substantially the same as those quoted above.

"alleged to have been erroneously or illegally assessed or collected" contained in Section 3228. Therefore, we respectfully submit that cases and rulings dealing with Section 281 of the Revenue Act of 1921 or similar successor sections of subsequent income tax Acts, are not controlling and, indeed, have no bearing on the issue presented in this case.

Secondly, in all of the other cases cited by the Government (Br. 15, 16, 21), as well as in the income tax cases above referred to, the payments there in question had been made *after* the filing of the tax return or the assessment of the tax, or at least contemporaneously therewith. The status of a remittance by a taxpayer *in advance* of his filing a tax return, was not involved.

The Government seeks to belittle the construction of the statute for which we contend by characterizing it as "novel" (Br. 14). But there is no "novelty" about it. As long ago as 1904, the opinion of this Court in *Chesbrough v. United States*, 192 U. S. 253 (cited by the Government, Br. 19), at least pointed the way to such a construction. Although it is true that in the *Chesbrough* case the taxpayer's petition was dismissed on the ground that the tax could not be recovered, because it had been paid voluntarily and without objection, nevertheless, the Court had occasion to comment on Section 3226 of the Revised Statutes which, in so far as material, provided as follows:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue, accord-

ing to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof * * *."

This Court, referring to the above quoted statutory provisions, said at page 262:

"The words 'until appeal shall have been duly made,' appear to us to imply an adverse decision by the collector, at least a compelled payment, or official demand for payment, from which the appeal is taken."

And at page 263 it added:

"This petition did not set up any ruling of the collector, either specific or resulting from a demand to which petitioner yielded under protest or with notice, and from which he appealed to the Commissioner * * *."

There is no substantial difference between the claim for refund required to be filed with the Commissioner under the statute here involved, before suit can be maintained for the recovery of the tax (Internal Revenue Code §3772(a)(1)) and the "appeal" to the Commissioner considered by this Court in the *Chesebrough* case. Both, we submit, imply that there has been some prior administrative decision or ruling either specific or resulting from an assessment or other official demand for the amount paid. At least one of the functions of a claim for refund under the statute here in question (as was the function of the former "appeal" to the Commissioner) is to obtain a reconsideration or review of the alleged erroneous or illegal action of the administrative officials in assessing or collecting the tax.

But indeed the Government itself on other occasions, in briefs which it has submitted to this and other courts, has contended for a construction of the statute which does not differ substantially from that which we are urging.

For example, in its brief in *Moses v. United States*, 28 F. Supp. 817, the Government said at page 4:

"There cannot be any payment of taxes until there is a determination of liability, because until such time there is nothing against which payment can be credited. On December 24, 1932, no return had been filed and no assessment had been made."

And on page 2 of its supplemental brief in the same case the Government stated:

"There is no authority whatever in the Collector to accept moneys in payment of taxes for which no return has been filed and of which there is no assessment. No statute or other authorization has been found by counsel on either side giving the Collector authority to accept moneys on behalf of taxes, not submitted with a return and not in payment of any outstanding assessment."

Again, in *Busser v. United States*, 130 F. (2d) 537, the Government in arguing that interest was not allowable on the amount of the refund there in question, said at page 15 of its brief:

"It [the allowance of interest] would make the Government liable where it has neither delayed nor defaulted, and where, indeed, the interest would become due solely because the taxpayer, *without filing a return*, overestimated his tax liability in a situation where, because there is no

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return, the Collector is helpless to check the estimate. For as stated in *Moses v. United States*, *supra*, at p. 818:

"When a taxpayer submits a return and accompanies it by payment, the Collector is put on notice then of the facts upon which the existence of a tax debt depends. He may, at that time, immediately check it. If he does not, he accepts the taxpayer's statement of the amount due and the parties are then in agreement and the whole amount received is given and taken as payment ***. In this case [where the remittance had been made in advance of the filing of the tax return], the Government was powerless at the time the money was delivered to it to determine how much, if any, was actually due!""

Indeed, in the Government's brief in the case at bar, submitted in opposition to our petition for certiorari, it stated at page 11:

"As was pointed out in both the *Busser* and *Atlantic Oil* cases, *supra*, when an excessive payment is made *in advance of the tax return*, the Collector is not guilty of a mistake in retaining the amount, since he has no means of determining the true liability." (Italics ours.)

Similarly, we contend that in such a situation the Collector is not guilty of any mistake or illegality in retaining the remittance pending the filing of the return, and thus it may not properly be charged that there has been an erroneous or illegal assessment or collection of the tax.

The Government argues (Br. 23) that the construction of the statute for which we are contending would result in "an exceedingly harsh rule for taxpayers" because "the taxpayer ordinarily does not know when

the actual assessment is made." But Section 3655(a) of the Internal Revenue Code requires the Collector, within ten days after receiving the assessment from the Commissioner, to give notice thereof to the taxpayer.

The Government refers to our argument as being that the cause of action accrues in all cases at the time the tax is assessed. This, of course, is incorrect. Normally the cause of action will accrue at the time of the payment because the tax will be assessed on the filing of the return or after the determination of a tax deficiency. It is only where the remittance is made in advance of the assessment that the cause of action will accrue at the time of the erroneous assessment because then for the first time the two necessary elements of the cause of action will co-exist.

The Government states (Br. 23) that we "would contend that even if an additional assessment were paid within three years before the filing of a claim, the taxpayer could not recover any of the tax attributable to an error on the original return." This statement is incorrect. If an additional tax is assessed which is in excess of the total tax due, it makes no difference whether the resulting excess is traceable to an error originating with the taxpayer in his return or originating with the Commissioner on his audit. In either case, the additional tax over and above the amount properly due is *erroneously and illegally assessed and collected*.

Next, the Government argues that according to our theory "interest [on a tax refund] should run not from the date of the overpayment *** but from the date of the assessment since it was not until that date that the tax became one erroneously or illegally assessed

or collected" "(Br. 23). But the statute dealing with interest on tax refunds does *not* now so read. Section 3771(a) of the Internal Revenue Code, in so far as material, provides:

- (a) Interest shall be allowed and paid upon any overpayment *in respect of* any internal revenue tax at the rate of 6 per centum per annum.
- (b) Such interest shall be allowed and paid as follows:

* * * *

- (2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. * * *¹¹ (Italics ours.)

Thus, the present statute dealing with interest on tax refunds, does not contain the phrase "erroneously or illegally assessed or collected".

On page 24 of its brief the Government seems to argue that *even if* in April, 1938, the Commissioner on auditing the estate tax return had determined that it was correct in all respects as filed, nevertheless, the petitioners would have been barred by the statute here in question (and Internal Revenue Code §3772(a)) from recovering the balance of \$39,775.76 which would have remained to their credit in Account #9. As authority for this contention the Government cites *United States v. A. S. Kreider Co.*, 313 U. S. 443, which merely held that a suit for the recovery of an alleged overpayment of income tax is governed by the specific statute of limitations applicable to such a suit.

and not by the general six-year statute of limitations contained in Section 156 of the Judicial Code (28 USCA §262).

But this argument of the Government obviously begs the question. It is true, as the Government asserts, that *this suit* is brought for the recovery of a tax, but in the assumed case, the petitioners would have been entitled to recover the balance remaining to their credit in Account #9, *not* as an overpayment of tax (that is to say, not as a tax "alleged to have been erroneously or illegally assessed or collected") but under Section 145 of the Judicial Code (28 USCA §250(1)) as an acknowledged indebtedness owing to them by the Government as shown by its own records and accounts, which the Government had impliedly promised to pay. (*Bull v. United States*, 295 U. S. 247, 261; *United States v. State Bank*, 96 U. S. 30, 35-36). Obviously *United States v. A. S. Kreider Co., supra*, would not apply in such a case.

The situation which we have assumed in the hypothetical case is precisely that which actually existed *immediately prior to the assessment of the additional tax* in April, 1938. Petitioners then had a valid claim against the Government under Sections 145 and 156 of the Judicial Code to recover the balance then standing to their credit in Account #9. This valid claim was in effect seized by the Collector in April, 1938, and applied by him in partial payment of the additional tax which was then assessed. It was *then* and not until then that petitioners' claim was converted from a claim under Section 145 of the Judicial Code into a claim for the recovery of a tax "alleged to have been erroneously or illegally assessed or collected". Thus, it was then and not until then that the statute

here involved and Section 3772(a) of the Internal Revenue Code and *United States v. A. S. Kreider Co., supra*, became applicable.

The Government seems to concede (Br. 18) that the amendment of Section 3228 of the Revised Statutes in 1921, to substitute the present phrase "next after the payment of such tax" for the former phrase "next after the cause of action accrued", did not accomplish any change in existing law.² We must assume, therefore, that such result was intended by Congress. Moreover, since that time Congress has not made any relevant amendment of Section 3228 of the Revised Statutes or the statute here involved which was derived therefrom. All that Congress did in 1924 was to amend another and different section of the Revised Statutes, namely, Section 3226 (dealing with the maintenance of *suits* for the recovery of taxes) so as to permit suit to be maintained, notwithstanding that the tax had not been paid under protest and duress. Thus, while the general law in respect of protest and duress has been changed, there has been

² Although the result reached by the Court in *Ordway v. United States*, 37 F. (2d) 19 (Br. 18), clearly seems to be correct, we respectfully submit that the *assumption* which was made both by the Bureau and the taxpayer that the "cause of action" referred to in Section 3228 of the Revised Statutes as it read prior to the 1921 amendment (§1316 of the Revenue Act of 1921), would accrue when the executors' commissions and other administration expenses were allowed by the Surrogate's Court on an accounting, plainly was incorrect. The "cause of action" referred to in Section 3228 of the Revised Statutes arose upon the payment of the additional tax erroneously assessed by the Commissioner when he disallowed those deductions. The statute required the Commissioner to determine the taxable estate after allowing those deductions, and if he failed to do so, his increase in the net taxable estate and the assessment of an additional tax was erroneous, notwithstanding that in order to demonstrate such error it was necessary to resort to some subsequent event, namely, the accounting in the Surrogate's Court.

no change with respect to Section 3228 and the statute here involved in so far as they provide that one of the necessary elements of the claim for refund or cause of action to which they relate is the alleged erroneous or illegal action of the administrative officials in assessing or collecting the tax.

II.

CONCERNING SUBDIVISION 2 OF GOVERNMENT'S BRIEF,
pages 25-35.

On page 28 of its brief the Government states:

" *** we submit that the evidence in this case shows an intention to pay the tax on the date the check was delivered to the Collector, even though the exact amount was not known."

In *Busser v. United States, supra*, the procedure followed by the taxpayer and the Collector in dealing with the remittance was substantially the same as in the present case. There the taxpayer's letter to the Collector, insofar as material, read as follows:

" I therefore enclose herewith a cheque for \$6800 payable to the order of the Collector of Internal Revenue, with the request that you apply this on account of the tax in the above estate ultimately shown to be due by the Estate Tax Return when filed."

The Government stated in its brief:

" *** Nor did either of the parties treat the transaction as a payment. Rather the trustee [*i.e.*, the taxpayer], in delivering the check, simply requested the Collector to apply it 'on account of the tax' *** ultimately shown to be due

by the Estate Tax Return when filed', and, in turn, the Collector ~~did not~~ give a receipt on the usual form used for tax payment. * * *. It is, therefore abundantly clear, from the parties' own treatment of the transaction that the mutual intention requisite to constitute payment was absent here."

The Government argues that the Collector treated the original remittance "not as a deposit but as a payment of tax" (Br. 29). The procedure followed by the Collector in this case was precisely the same as that which he followed in the *Moses* and *Busser* cases, *supra*, in both of which the Government successfully contended that the remittance was treated by the Collector as a "deposit" and not as a tax payment (Petitioner's Main Brief, Point III).

The Government states on page 29 of its brief that the petitioners' letter to the Collector "did not indicate that the petitioners were paying more than they estimated that the return would disclose". We respectfully submit that petitioners' letter *did* so indicate when it stated " * * * it is contended by the executors that not all of this sum is legally or lawfully due" (R. 7). Actually the estate tax return was filed only two months thereafter and it showed that the tax liability was only \$80,224.24—very substantially less than the amount of the original remittance of \$120,000.

Let us assume that the petitioners had sent to the Collector their original remittance of \$120,000 at the same time that they filed their tax return showing a tax liability of \$80,224.24. We submit that in the assumed case the excess of \$39,775.76 over the amount of the tax shown in the return could hardly be characterized as a present payment of the tax. Rather, such excess would have been money which was (to quote the Government's language) "dumped on the

Collector with no relevance to actual requirements" (Br. 33, 34).

The Government points out (Br. 33) that Section 3770 of the Internal Revenue Code was recently amended by Section 4 of the Current Tax Payment Act of 1948. While the statute relating to interest is Section 3771 of the Internal Revenue Code, the Government states that the amendment of Section 3770 apparently makes the decisions in the *Moses* and *Bissell* cases, *supra*, inoperative. This may be true in so far as those cases dealt with the allowance of interest. The amendment, however, had no effect on the statute here involved or on the issue herein presented.

III.

~~CONCERNING TREATMENT OF FUNDS IN ACCOUNT #9~~

The statement on page 7 of the Government's brief that "All payments placed in Account 9 are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list", perhaps requires some further explanation. Of course, under the law Collectors of Internal Revenue are required to pay over to the Treasurer of the United States *all* moneys collected by them (26 USCA §3971(a)). Moneys held by the Collector in Suspense Account #9 are so paid over. But they are *not* paid to the Treasurer of the United States as moneys belonging to the Government. In the present case the Court of Claims found (R. 8) that the Collector placed the original remittance of \$120,000 "to the credit of that estate [estate of Louis Roseman] in Account 9 in his books". It also found that "The balance of such

amount of \$120,000, that is, \$39,775.76, remained in Account 9 to the credit of the estate until April 1938, as shown by findings 8 and 9¹. Obviously, the same amount may not stand to the credit of two different persons at the same time and, therefore, we submit that it is sufficiently clear from the findings of the Court below that although the actual cash representing the original remittance of \$120,000 was paid over to the Treasurer of the United States, it was, nevertheless, paid over to him to be held for the account and to the credit of the estate as shown by the Collector's books. In other words, when the cash was paid over to the Treasurer of the United States, the cash account of the Treasurer must have been correspondingly debited or else the Collector's books would not have balanced because on his books the amount in question was being held for the account and to the credit of the estate.

The Government in its brief in *Atlantic Oil Producing Co. v. United States*, 35⁸F. Supp. 766, recognized that the procedure which we have just mentioned, whereby amounts in Account 9 are paid over by the Collector to the Treasurer of the United States, was of no significance. It stated at page 26 of its brief:

"The Collector did the only thing he could to indicate that the deposit was not a 'normal' tax payment when he credited it to Suspense Account 9. That action once and for all served to distinguish it from a tax payment. What happened afterwards in the way of covering it into the Treasury, et cetera, is unimportant."

Respectfully submitted,

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